

**HARRIS,  
WILTSHIRE &  
GRANNIS LLP**

1200 EIGHTEENTH STREET, NW  
WASHINGTON, DC 20036

TEL 202 730 1300 FAX 202 730 1301  
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

September 5, 2003

**BY HAND DELIVERY**

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re *Consolidated Application of General Motors Corporation,  
Hughes Electronics Corporation, and The News Corporation Limited  
for Authority to Transfer Control (MB Docket No. 03-124)*

Dear Ms. Dortch:

On August 15, 2003, the Commission's International Bureau issued an order in the *SES Americom* proceeding in which it discussed the potential public interest implications of foreign ownership in cases involving subscription satellite direct-to-home ("DTH") services.<sup>1</sup> In light of that recent order, The News Corporation Limited ("News Corp.") hereby supplements its earlier responses on the potential implications of foreign ownership in this proceeding due to News Corp.'s proposed acquisition of a 34% indirect interest in the DIRECTV subscription direct broadcast satellite ("DBS") service.

As discussed below, the fact that News Corp. is incorporated in Australia raises no special public interest concerns in this proceeding. First, the *SES Americom* decision confirms that the foreign ownership analyses under Section 310(b) of the Communications Act of 1934 and the Commission's *DISCO II* decision do not apply to News Corp.'s proposed indirect investment in DIRECTV. Second, it is not even clear that this transaction raises any foreign ownership issues at all because the United States could, given News Corp.'s extensive ties to the U.S., be deemed to be the company's "home market" under Commission precedent.<sup>2</sup> Third, even assuming that the Australian

<sup>1</sup> See *SES Americom, Inc.* DA 03-2683 (Int'l Bur. let. Aug. 15, 2003) ("*SES Americom*").

<sup>2</sup> Such a conclusion would be consistent with the recent finding by the Committee on Foreign Investment in the United States ("CFIUS") – comprised of the Executive Branch agencies charged with reviewing foreign investment in U.S. companies – that News Corp. is not a "foreign person." See Letter from Gay Hartwell Sills to Cecil Hunt (dated Sept. 2, 2003).

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market is relevant to this proceeding, a U.S. company would be able to invest in an Australian subscription DTH operator at a level equal to *or greater than* News Corp.'s proposed investment in DIRECTV. Moreover, as articulated in the Consolidated Application and other filings in this proceeding, the proposed investment will result in substantial efficiencies and other public interest benefits.

In *SES Americom*, the Bureau specifically found – as News Corp. has stated in this proceeding<sup>3</sup> – that cases involving foreign investment in U.S.-licensed subscription DTH services do not fall within the analytical framework applicable either to entry by foreign-licensed satellite systems established in the *DISCO II* order or to foreign investment in broadcast or common carrier radio licensees established in Section 310(b) of the Communications Act of 1934 and the Commission's *Foreign Participation Order*.<sup>4</sup> Nonetheless, the Bureau stated that the Commission's general public interest analysis may, in appropriate cases, include an evaluation of proposed foreign investment in a subscription DTH licensee.<sup>5</sup>

The *SES Americom* order does not specify exactly how this analysis would determine the appropriate foreign "home market" for consideration. News Corp. is an Australian corporation. In the broadcast context, the Commission has on a number of occasions treated investments by News Corp. as Australian based solely on its country of incorporation.<sup>6</sup> However, because News Corp. has not yet applied for a U.S. common carrier radio license,<sup>7</sup> the Commission has never considered whether Australia is the appropriate "home market" under criteria such as those established in the *Foreign Participation Order* for purposes of the Commission's analysis of indirect foreign ownership of such licensees under Section 310(b)(4) – criteria that presumably would apply to a public interest analysis under Section 310(d).<sup>8</sup> Under those criteria, the

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<sup>3</sup> See Opposition to Petitions to Deny and Reply Comments at pp. 67-69 (filed July 1, 2003).

<sup>4</sup> *SES Americom* at ¶¶ 3-4, 10.

<sup>5</sup> *Id.* at ¶ 10.

<sup>6</sup> See, e.g., *Fox Television Stations, Inc.*, 11 FCC Rcd. 5714 (1995).

<sup>7</sup> It is interesting to note that when News Corp. acquired a 32% interest in another U.S.-licensed subscription DBS service (EchoStar) which has since been divested, the Commission did not conduct a foreign ownership analysis of any kind but simply deferred to a companion order that held that statutory foreign ownership limitations on broadcast and common carrier licensees do not apply to subscription DTH licensees. See *MCI Telecom Corp. and EchoStar 110 Corp.*, 16 FCC Rcd. 21608, 21630 (1999) (deferring to *MCI Telecom Corp.*, 14 FCC Rcd. 11077 (1999)).

<sup>8</sup> In fact, the Commission used just such an analysis in approving the original transaction that created SLS Americom. See *General Electric Capital Corp. and SES Global S.A.*, 16 FCC Rcd. 17575, 17586-89 (Int'l Bur. and Wireless Tel. Bur. 2001).

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country of incorporation is but one of five factors that must be balanced in order to determine an entity's "home market." The other factors are (1) the nationality of all investment principals, officers, and directors, (2) the country in which the entity's world headquarters is located, (3) the country in which the majority of its tangible property is located, and (4) the country from which it derives the greatest sales and revenues from its operations.<sup>9</sup>

If the analytical framework for determining the appropriate "home market" in the *Foreign Participation Order* is applicable to the public interest analysis in this case,<sup>10</sup> the factors enumerated above lead to the conclusion that the United States is the most appropriate "home market" for News Corp. First, 10 of the 15 members of News Corp.'s board of directors and 18 of the 21 members of its Executive Management Committee are U.S. citizens.<sup>11</sup> Rupert Murdoch – Chairman of the Board and Chief Executive of News Corp. and the company's largest interest holder – is a U.S. citizen. Second, while its registered office is located in Australia, News Corp.'s primary executive offices are located in New York City. Third, most of News Corp.'s tangible property – including Twentieth Century Fox Studios, the Fox Cable Network Group, the Fox Broadcast Network, the broadcast stations owned and operated by the Fox Television Stations, and numerous other publishing interests -- are located in the U.S. Fourth, approximately 70% of its operating income and 77% of its revenue was derived from its U.S. operations in fiscal year 2002.<sup>12</sup> Taken as a whole the factors pointing to the U.S. as News Corp.'s home market clearly outweigh those that point to Australia.<sup>13</sup> The United States is both

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<sup>9</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891, 23941 (1997) ("Foreign Participation Order") (continuing policy adopted in *Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd. 3873, 3951 (1995) ("Foreign Carrier Entry Order").

<sup>10</sup> The International Bureau suggested in a prior case that, even if consideration of a foreign market were appropriate in a subscription DBS case, the "most analogous precedent" would include the "home market" analysis outlined above. *See Loral Corp.*, 12 FCC Rcd. 24325, 24330 (Int'l Bu. 1997) (discussing company incorporated in Bermuda found to have its home market in the United States).

<sup>11</sup> The Executive Management Committee is an informal body comprising Executive Directors of News Corp. as well as senior executives from the company's businesses or companies in which News Corp. holds a significant interest. The primary objective of the committee is to strengthen the coordination and profitability of News Corp.'s activities.

<sup>12</sup> *See* The News Corporation Limited Annual Report as of June 30, 2002, at p. 4 (available at [www.newscorp.com/epor2002/2002\\_annual\\_report.pdf](http://www.newscorp.com/epor2002/2002_annual_report.pdf)).

<sup>13</sup> By comparison, only three members of the News Corp. Board of Directors and one member of the Executive Management Committee are Australian citizens, and only 7% of its operating income and 8% of its revenues were derived from operations in Australasia (which includes both Australia and Asia, and so is an overstated figure for Australia alone).

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the company's "nerve center" and the place in which the company carries out most of its business operations.<sup>14</sup> In such circumstances, a foreign corporation can be (and in the past has been) deemed to have its home market in the United States for purposes of the *Foreign Participation Order* analysis.<sup>15</sup>

Accordingly, the Commission should find as a threshold matter that there is no foreign ownership issue in this proceeding because News Corp.'s "home market" is the United States.<sup>16</sup> At a minimum, the company's significant ties to the United States and the dominant influence exercised by U.S. citizens should be relevant to the Commission's public interest analysis.

However, even if the Commission were to conclude that Australia is the appropriate foreign market for analysis in this case, there is no cause for concern under the criteria articulated in *SES Americom*. In that proceeding, the Bureau focused its analysis on whether foreign ownership of a subscription DTH licensee was likely to distort competition in any relevant U.S. market. Specifically, the Bureau said that it will consider whether foreign investment will further competition in the U.S. market or whether substantial competitive harm is likely to occur, and will also consider efficiencies and other public interest benefits that are likely to result.<sup>17</sup> In addition, this review will take into consideration concerns, if any, raised by the Executive Branch regarding issues of national security, law enforcement, foreign policy and trade policy.<sup>18</sup>

Applying this framework in *SES Americom*, the Bureau found that foreign investment in *SES Americom* would not distort competition by providing it any

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<sup>14</sup> See *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3950-51.

<sup>15</sup> See, e.g., *Vodafone Americas Asia Inc. and Globalstar Corp.*, 17 FCC Rcd. 12849-12864 (Int'l Bur. 2002) (confirming conclusion reached in *AT&T Corp. and Loral SpaceCom Corp.*, 12 FCC Rcd. 925-928 (Int'l Bur. 1997) that the home market of a Bermuda company is the United States). Such a conclusion would be consistent with the recent finding by CFIUS. Moreover, such a conclusion in the subscription DTH context would have no effect upon a contrary conclusion in the broadcast context where the Commission has not adopted a "home market" analysis such as that set forth in the *Foreign Participation Order*.

<sup>16</sup> Significantly, under Australian law, News Corp. is deemed to be a foreign person for purposes of broadcast ownership provisions. See Sections 6, 7, 8, and 57, and Schedule 1 of Australia's Broadcasting Services Act of 1992 (defining "foreign person," "company interest", and types of control and prohibiting control of broadcasters by foreign persons) (available at [www.austlii.edu.au/au/legis/cth/consol\\_act/bsa1992214](http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214)).

<sup>17</sup> *SES Americom* at ¶ 18.

<sup>18</sup> *Id.* at ¶ 10.

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competitive advantages in the provision of DTH service in the U.S. market.<sup>19</sup> The Bureau further concluded that SES Americom's ownership would not have a negative effect on competition in the DTH market in the United States because it "will not diminish the level of service or the level of competition in the provision of DTH services or in the provision of MVPD services, but in fact can only be expected to expand the provision of such services and thus increase the level of competition in the provision of those services."<sup>20</sup> Accordingly, the Bureau concluded that grant of SES Americom's application would serve the public interest.

The same is true in this case. News Corp. has no interest in any other video programming distributor serving the United States, so its acquisition of an interest in DIRECTV will not decrease the number of MVPD competitors in the market. Moreover, because it will bring to DIRECTV valuable energy, vision, and expertise gained from its other media endeavors, News Corp. can be expected to capture efficiencies and improve DIRECTV's offering to consumers and thereby elevate the level of MVPD competition to the benefit of all American subscribers.<sup>21</sup> In addition, the transaction has recently cleared the Executive Branch's CFIUS process.

In *SES Americom*, the Bureau also identified the concern that "competitive distortions" could be created if a foreign company could invest in a U.S.-licensed DTH satellite system while a U.S. company could not similarly invest in a DTH satellite system serving the foreign investor's market.<sup>22</sup> That is not a concern in this proceeding because there is no effective restriction on indirect foreign ownership of subscription DTH operators under Australian law. Section 109 of Australia's Broadcasting Services Act of 1992 provides that a foreign person may not hold more than 20% in a subscription television broadcast license, nor may the total interest of all foreign persons in such a license exceed 35%.<sup>23</sup> These limitations are similar to the 20% cap imposed on direct foreign investment in U.S.-licensed broadcast and common carrier licensees under Section 310(b)(3) of the Communications Act.<sup>24</sup> However, under Australian law, there is

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<sup>19</sup> *Id.* at ¶ 17.

<sup>20</sup> *Id.* at ¶ 22.

<sup>21</sup> For a discussion of the synergies and efficiencies that the parties anticipate as a result of the proposed transaction, see Consolidated Application for Authority to Transfer Control at pp. 16-44.

<sup>22</sup> *SES Americom* at ¶ 16. Because there was no evidence in the record in that proceeding, however, the Bureau did not actually conduct an analysis of any foreign market or explain how it would do so.

<sup>23</sup> This statutory provision is available at [www.austlii.edu.au/au/legis/cth/consol\\_act/bsa1992214/s109.html](http://www.austlii.edu.au/au/legis/cth/consol_act/bsa1992214/s109.html).

<sup>24</sup> See 47 U.S.C. § 310(b)(3).

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no limit on or prohibition against foreign control of a subscription DTH licensee company<sup>25</sup>. By contrast, under U.S. law, even indirect ownership in a broadcast or common carrier licensee is presumptively limited to no more than a non-controlling 25% interest absent authorization from the Commission to exceed that benchmark<sup>26</sup>. Taken as a whole, the Australian subscription DTH market is at least as open to foreign investors as is the U.S. market.

The facts in Australia bear out this legal analysis. One of the two subscription DTH operators in Australia – Austar United Communications Limited (“Austar”) – has for many years been indirectly majority owned and controlled by a U.S. company, UnitedGlobalCom, Inc. (“UGC”). Until earlier this year, UGC held a greater than 55% indirect interest in Austar, and U.S.-controlled corporations held a combined interest of over 91% in the company<sup>27</sup>. As a result of a bankruptcy reorganization plan, an investment group led by Castle Harlan, Inc., a New York merchant bank, recently acquired an indirect 51% interest in Austar<sup>28</sup>. While UGC’s interest was thereby reduced to approximately 30%, U.S. interests will continue to control Austar and a majority of its stock. Accordingly, allowing News Corp. to acquire a minority interest in DIRECTV would surely not distort competition in the U.S. market.

To the contrary, imposing foreign ownership limitations in this transaction *would* distort competition in the U.S. market. No other subscription MVPD service in the United States is subject to limitations on foreign investment. In fact, the Commission has twice declined to impose such limitations on cable operators<sup>29</sup>. In a recent order

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<sup>25</sup> A non-Australian investor in a DTH system may also seek clearance from the Foreign Investment Review Board (“FIRB”). Information on the FIRB may be found at [www.firb.gov.au](http://www.firb.gov.au). This process is analogous to the ability of non-U.S. investors to seek CFIUS clearance as a prophylactic against future challenges to foreign ownership based on national security concerns. *See generally* 31 C.F.R. Part 800 (implementing the “Exon-Florio” provision of the Defense Production Act, codified at 50 U.S.C. § 2170).

<sup>26</sup> *See id.* at § 310(b)(4).

<sup>27</sup> *See, e.g., In the matter of Austar United Communications Limited*, Reason for Decision of the Takeovers Panel, at p. 2 and Appendix A (dated June 4, 2003)(describing Austar’s current ownership structure)(available at [www.takeovers.gov.au/content/decisions/download/Austar\\_11](http://www.takeovers.gov.au/content/decisions/download/Austar_11)), 2002 Annual Report of UnitedGlobalCom, Inc., at pp. 2, 10-11 (dated Dec. 31, 2002) (describing UGC’s interests in Austar).

<sup>28</sup> *See id.*, *see also* “Castle Harlan Affiliate Acquires Majority Stake in Australian Satellite TV Company” (April 22, 2003)(available at [www.castleharlan.com/news/news61.html](http://www.castleharlan.com/news/news61.html)).

<sup>29</sup> *Amendment of Parts 76 and 78 of the Commission’s Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service*, 59 F.C.C.2d 723, 727 (1976), *Amendment of Parts 76 and 78 of the Commission’s Rules to Adopt General Citizenship Requirements for Operation of Cable*

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eliminating a rule that imposed foreign ownership limitations on certain DBS/DTH operators, the Commission justified its action on the grounds that eliminating those restrictions would (1) "allow DBS to compete on a more equal regulatory basis," (2) "promote flexible investment policies," and (3) "eliminate regulatory uncertainty about the circumstances under which such [foreign ownership] rules apply."<sup>30</sup> The Bureau's *SES Americom* decision could, if misapplied by opponents of a given transaction, undermine those important Commission goals. As demonstrated in this letter, there are several bases for concluding that foreign ownership is not a legitimate concern and therefore there should be no opportunity for such misapplication in this proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,



William M. Wiltshire  
*Counsel for The News Corporation Limited*

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*Television Systems and for Grant of Station Licenses in the Cable Television Relay Service*, 77 F.C.C.2d 73, 80 (1980)

<sup>30</sup> *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11348 (2002)